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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. ROY A. MONTES, Defendant and Appellant.	B187913 (Los Angeles County Super. Ct. No. MA028958)

APPEAL from a judgment of the Superior Court of Los Angeles County, John Murphy, Judge. Affirmed.

Edward H. Schulman, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Margaret E. Maxwell and Stephanie C. Brenan, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant Roy A. Montes of second degree murder (§ 187, subd. (a)),[1] and found true allegations that he personally used a firearm, discharged a firearm, and discharged a firearm causing death (§ 12022.53, subds. (b), (c), & (d).) He was sentenced to an aggregate state prison term of 40 years to life, and now appeals from the judgment.[2] He contends: (1) the trial court erred in failing to instruct the jury that evidence of hallucination could be considered in support of imperfect self defense; and (2) the imposition of an enhancement under section 12022.53, subdivision (d), for discharging a firearm causing death violated the "merger" doctrine and section 654. We affirm.

BACKGROUND

I. *Prosecution Evidence*

In the early morning hours of May 14, 2004, defendant shot Travis McMillon to death in the garage of Melissa Samuels' residence in Palmdale, California. Samuels had met defendant on May 13 through a drug-dealer acquaintance, known only as "Country."

Throughout the afternoon of May 13 and into the night at Samuels' residence, defendant drank alcohol and used crack cocaine with Samuels and others (Samuels' sister Dorise, Samuels' friend Michelle DeLeon, and Mario Davis). Defendant came and went several times. Samuels found him to be

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[1] All undesignated code references are to the Penal Code.

[2] Defendant was charged with a prior "strike" (§§ 667, subds. (b)-(i); 1170.12, subds. (a)-(d)), a prior serious felony conviction (§ 667, subd. (a)(1)), and three prior prison terms (§ 667.5, subd. (b)). The record does not reflect what became of these allegations. The parties suggest that the prosecution did not proceed on these allegations, and they form no part of the sentence.

"stressing bad," and she perceived he had two personalities: at one moment he would be "very angry and mean," and the next moment calm.

Between 3:00 and 4:00 a.m. on May 14, while defendant was away from the residence, Travis McMillon, an acquaintance of Samuels', arrived. McMillon told Samuels that he was there to wait for Country. Shortly afterward, defendant returned, followed in a few minutes by Mario Davis (like defendant, Davis came and went several times).

Samuels tried to introduce defendant to McMillon, but McMillon said that he had already met defendant at Country's residence.[3] Samuels felt something was not right, and took McMillon into the garage (which adjoined the kitchen) to ask what he was doing there. From the garage, Samuels saw defendant in the open kitchen doorway watching them. She felt uncomfortable, and did not want defendant listening. She told McMillon they would talk later, and left the garage. Defendant passed her as he entered the garage.

Within seconds, Samuels heard three gunshots. McMillon staggered into the kitchen "hugging himself," said he had been shot, and collapsed. Defendant left the residence in his truck, but abandoned it about 100 yards away.

According to Michele DeLeon, as defendant stood in the kitchen doorway to the garage watching Melissa and McMillon, he held a pistol at his side, partially concealed by a jacket. DeLeon heard gunshots almost immediately after – perhaps 30 seconds -- defendant entered the garage.

McMillon was not armed. Melissa Samuels testified that she heard no arguing between defendant and McMillon before the shooting, but she had told a

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[3] At the preliminary hearing, she had testified that *defendant* said he had met Travis at Country's. At trial, she testified that her preliminary hearing testimony on the point was mistaken.

responding police officer that she had. Mario Davis heard talking in the garage after Samuels left and defendant entered.

McMillon died from three gunshot wounds: one to the mid-chest, one below the rib cage, and one in the armpit. The wounds showed no powder burns.

Defendant was arrested on June 21, 2004. In a monitored jail conversation, he told a fellow inmate that he "[g]ot caught up in this murder. Killed somebody."

II. *Defense*

Defendant testified in his own defense. He came to Lancaster from Los Angeles about two weeks before the killing. He was addicted to crack cocaine, and had a $100 a day habit. He paid Country $10,000 to keep him supplied with drugs. The money was left over from a $149,000 settlement defendant had received from a civil case arising from the Rampart police scandal.

After paying Country for drugs, defendant still had $10,000 in cash left. Defendant had met Melissa Samuels through Country, and was hoping Samuels would let him live in a room at her residence. On May 13, 2004, Country told defendant that there was going to be a party at Samuels' residence. Defendant decided to wait for Country there. During the day, defendant left Samuels' residence and returned several times with drugs he obtained from Country, and shared them with everyone else present. Defendant became "really high," and had difficulty remembering some of the details. At one point, however, he left Samuels' residence, sat in his truck, listened to music, and prayed for help to stop using drugs.

About 3:00 or 4:00 a.m., defendant went to Country's home. While he has there, someone knocked on the door. Country opened the door, and defendant saw McMillon, whom he had never met before, standing there. Country appeared

agitated, and looked at defendant "with this wild look." Country told McMillon to go to Samuels' residence. Defendant and McMillon did not speak.

After McMillon left, defendant stayed at Country's for about 15 or 20 minutes talking to Country. Country then told defendant to go to Samuels' residence. Defendant went there to wait for Country. Mario Davis arrived at Samuels' few minutes later.

Defendant had $10,000 in cash on his person, and was carrying a .38 caliber revolver in his pants pocket. As he stood in Samuels' kitchen near the door to the garage, waiting to use the bathroom, he became concerned for his safety. Country knew he had $10,000. There was someone in the bathroom that defendant did not know. Samuels was acting "very aggressive" toward defendant.

Samuels and McMillon went into the garage. Defendant heard them arguing. Samuels came into the kitchen, and accused defendant of listening. She led defendant by the hand into the garage, and told him to stay there.

The garage was dark, but defendant could see McMillon sitting in a chair. McMillon smiled, and said something like, "Do you have the money?" or "What about the money?" Defendant was "shocked." McMillon leaned forward to stand up, pulled out a blue steel pistol, and pointed it at defendant. Fearing for his life, defendant pulled out his revolver, and shot McMillon three times in rapid succession. McMillon exclaimed, "Don't kill me." Defendant fled to his truck and drove off, but left the truck not far from Samuels' residence. In the days after the killing, he made his way to Los Angeles, Santa Monica, San Diego, and back to Los Angeles, where he was arrested at his mother's home.

Even though he was high at the time of the killing, defendant knew "exactly what was happening," and intended to kill McMillon to save his own life. He had no explanation for why McMillon's gun was never found at the scene.

DISCUSSION

CALJIC No. 8.73.1

The trial court instructed the jury on deliberate and premeditated first degree murder, second degree murder on express and implied malice theories, self-defense, and voluntary manslaughter based on heat of passion and imperfect self defense. Pursuant to CALJIC No. 8.73.1, the court also instructed on evidence of hallucination: "A hallucination is a perception that has no objective reality. [¶] If the evidence establishes that the perpetrator of an unlawful killing suffered from a hallucination which contributed as a cause of the homicide, you should consider that evidence solely on the issue of whether the perpetrator killed with or without deliberation and premeditation."

Defendant contends that this instruction permitted the jury to consider evidence of hallucination only to determine the degree of murder, and erroneously failed to permit the jury to consider "whether [defendant's] hallucinatory state caused him to harbor an honest belief, albeit unreasonable, in the need to use deadly force in self-defense in order to negate the malice component of murder and reduce the offense to voluntary manslaughter." We disagree.

As defendant acknowledges, case law has rejected the argument that delusional thinking can negate malice and reduce a homicide from murder to voluntary manslaughter. (*People v. Padilla* (2002) 103 Cal.App.4th 675, 678-679 [hallucination – "a perception with no objective reality" – "cannot as a matter of law negate malice so as to mitigate murder to voluntary manslaughter . . . on a 'sudden quarrel or heat of passion' theory of statutory voluntary manslaughter [citations], or on a 'diminished actuality' theory of nonstatutory voluntary manslaughter [citations]"]; *People v. Mejia-Lenares* (2006) 135 Cal.App.4th 1437, 1456-1457 [delusion cannot reduce murder to manslaughter on imperfect self

defense theory].)[4] Defendant asserts that these cases were wrongly decided, and that they are distinguishable from his. We see no reason to disagree with the analysis of these decisions, and further find the *Mejia-Lenares* holding directly on point. Hence, we conclude that CALJIC No. 8.73.1 is a correct statement of the law.

Even were we to conclude that CALJIC No. 8.73.1 is erroneous, defendant suffered no prejudice. Contrary to defendant's argument, the error is subject not to the test of *Chapman v. California* (1967) 386 U.S. 18, 24 reserved for federal constitutional error, but to the test of *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. Breverman* (1998) 19 Cal.4th 142, 177-178 (*Breverman*) [error in failing to instruct on lesser included offenses is subject to *Watson* test].)

There was no evidence that defendant's perception of the need to defend himself – most particularly, his perception that McMillon asked him about money and produced a gun in the darkened garage -- was the product of drug-and alcohol-induced hallucination. True, there was evidence that defendant had ingested crack cocaine and drank alcohol in the hours before the shooting, and he testified that he was high at the time of the shooting. But there was no evidence of how much cocaine and alcohol defendant consumed. Further, defendant testified that he knew "exactly what was happening" when he shot McMillon. He never mentioned being

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[4] In *People v. Wright* (2005) 35 Cal.4th 964, 966 (*Wright*), the California Supreme Court granted review to determine whether to extend imperfect self defense "to a case in which the defendant's actual, though unreasonable, belief in the need to defend himself was based on delusions and/or hallucinations resulting from mental illness or voluntary intoxication, without any objective circumstances suggestive of a threat." However, the court concluded that it need not reach the issue "because defendant was able to claim imperfect self defense, the jury heard evidence supporting that defense, and the trial court's exclusion of additional evidence supporting that defense was not prejudicial to defendant." (*Ibid.*)

delusional at any time before or after the shooting, and there was no evidence that he was. Moreover, there was no expert testimony concerning the likelihood that someone under the influence of alcohol and crack cocaine might be hallucinatory.

Indeed, in his argument to the jury, defense counsel never mentioned the subject of hallucination. To the extent he discussed defendant's professed need to defend himself, he suggested that defendant's version of events was based on *objective* reality. Thus, in addressing the absence of McMillon's gun at the scene when police arrived, he suggested that it might have been hidden. He argued: "If the drug paraphernalia [in Samuels' residence] could have been moved [before police arrived], and there may have been somebody else in the bathroom, at least [defendant] thought so, a gun in the possession of Mr. McMillon could have been moved just as easily because that would implicate Melissa Samuels and Country. But what motive would anybody have against Mr. McMillon? Nothing. There's no indication of any reason that there would be any problem with Mr. McMillon, but there could be a reason that someone would seek to remove or to separate [defendant] from the money that they believed he had. That's the only . . . motive we could find for facing off with the other individual."

At another point, defense counsel argued that defendant's version of events was corroborated by the location of McMillon's wounds: "Ask yourself what motive would [defendant] have. And ask yourself what motive might anybody else have to pull a gun. Ask yourself how the bullets could have entered [McMillon] at a 45-degree angle unless . . . Mr. McMillon was leaning forward pulling something out of his pocket. Now, he could lean forward, obviously, without pulling something out of his pocket without getting up. We know that. But it certainly is consistent with the way the bullets entered."

The only mention of the possibility that defendant was hallucinating occurred in the prosecution's rebuttal argument. The prosecutor briefly argued that

"even [if you] believe what the defendant said [about McMillon drawing a gun], he was hallucinating, that's what he was doing, either that or he was lying to you." But the prosecutor could point to no evidence other than defendant's drug use to suggest defendant was hallucinating. Defendant's drug use, however, was not evidence that he was delusional in seeing McMillon draw a gun.

Because there was no evidence that defendant's perception of the need to defend himself was hallucinatory – indeed, the subject of hallucination was not even mentioned in defense counsel's argument, and only briefly mentioned by the prosecutor -- it is not reasonably probable that defendant would have obtained a more favorable outcome in the absence of the assumed error in CALJIC No. 8.73.1. (*Breverman, supra,* 19 Cal.4th at p. 178.)[5]

The Section 12022.53, Subdivision (d) Enhancement

The jury found true the allegation, pled pursuant to section 12022.53, subdivision (d), that defendant "personally and intentionally discharge[d] a firearm and proximately cause[d] . . . death." This enhancement resulted in an additional and consecutive term of 25 years to life. Defendant now advances two arguments as to why the additional sentence is improper. We are not persuaded by either argument.

Defendant first claims that the merger doctrine articulated in *People v. Ireland* (1969) 70 Cal.2d 522 precludes imposition of the enhancement. He argues that the enhancement provision is "necessarily subsumed within the crime of murder when death is proximately caused by the defendant's conduct in

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[5] Given the paucity of evidence of hallucination, and defendant's ability to claim imperfect self defense, any error in CALJIC No. 8.73.1 would also be harmless beyond a reasonable doubt under *Chapman*. (See also *Wright,* 35 Cal.4th at pp. 974-975.)

intentionally discharging a firearm." As recently explained in *People v. Sanders* (2003) 111 Cal.App.4th 1371 (*Sanders*), defendant's argument is based upon a misreading of the merger doctrine. *People v. Ireland, supra*, 70 Cal.2d 522, held only that "the felony-murder rule could not be applied when the only underlying or predicate felony the defendant committed was assault, because the assault is an integral part of the homicide [and therefore merges into the resulting homicide]. To hold otherwise would relieve the prosecution in most homicide cases of the need to prove malice, as most homicide cases involve assault." (*Sanders, supra*, 111 Cal.App.4th at p. 1374.) *Sanders* went on to note that the "merger doctrine has not been applied other than in the context of felony murder and assault"; that "there is no authority extending the merger doctrine to enhancements"; and, that given the California Supreme Court's most recent explanations of the merger doctrine, "[a] sentence enhancement does not fit within [its] delineation of the merger doctrine." (*Ibid*.) We agree with *Sanders'* analysis and therefore reject defendant's argument that the sentence violates the merger doctrine.

Defendant next argues that imposition of the sentence on the enhancement violates section 654. Because the firearm use is not a specific element of the charged offense, the argument lacks merit. (*People v. Sanders, supra*, 111 Cal.App.4th at p. 1375, and *People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1311-1315; see also *People v. Myers* (1997) 59 Cal.App.4th 1523, 1529-1535 [§ 654 does not apply to § 12022.55 enhancement]; and *People v. Ross* (1994) 28 Cal.App.4th 1151, 1157-1159 [§ 654 does not apply to § 12022.5 enhancement].)[6]

In sum, the trial court did not err in imposing a consecutive sentence enhancement for the section 12022.53, subdivision (d) finding.

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[6] Whether section 654 applies to statutory enhancements is an issue currently pending before the California Supreme Court. (See, e.g., *People v. Sloan,* review granted June 8, 2005, S132605, and *People v. Izaguirre*, review granted June 8, 2005, S132980.)

DISPOSITION

The judgment is affirmed.

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WILLHITE, Acting P. J.

We concur:

MANELLA, J.

SUZUKAWA, J.